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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 702

RONALD L. JOHNSON,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

REPLY BRIEF FOR THE PETITIONER

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The argument is made in the brief for the Respondent, Commonwealth of Massachusetts (at pages 20 to 21), that this Court does not have jurisdiction herein to consider whether the due process requirements of the Fourteenth Amendment forbid placing on the defendant the burden of proof on the issue of the voluntariness of his confession. This argument is based on Respondent's contentions that this constitutional challenge was not raised below and that the statement in the Massachusetts Supreme Judicial Court's opinion that the burden was on the defendant, was merely "a comment". These contentions by Respondent are not supported in law, nor indeed by the facts of the proceedings below.

A.

The Due Process Question, Unquestionably Before This Court, Necessarily Involves the Procedure Through Which the Confession Was Utilized.

The Respondent does not dispute that the issue of whether the "trial Court considered all relevant factors in conformity with due process in reaching its determination of voluntariness" is properly before this Court. See Respondent's brief, page 15. But the Respondent attempts to single out one aspect of due process, *i.e.* the burden of proof on the issue of voluntariness, as not properly here.

This Court has held that "in affirming the conviction and sentence of death, the court below necessarily determined that use of the confession did not constitute a denial of that due process which the Fourteenth Amendment guarantees." *White* v. *Texas,* 310 U.S. 530, 531. Annotation, *Admissibility of Pretrial Confession in Criminal Cases—Supreme Court Cases,* 1 L.Ed. 2d 1735, § 15. See *Turner* v. *Louisiana,* 379 U.S. 466, 470-471 and *Stein* v. *New York,* 346 U.S. 156 where the state procedures with respect to the confession were discussed at length although the affirmance of the conviction by the Court of Appeals of New York was without opinion; see also *Musser* v. *Utah,* 333 U.S. 95, 96.

When the Petitioner's confession was offered into evidence it was objected to on the grounds of voluntariness (A. 97, 189, 191) and its admission into evidence was assigned as error on appeal to the Supreme Judicial Court. Assignments 7 and 12 (A. 332-333). In admitting the confession and affirming the conviction, over the objection and assignments of error, the state courts necessarily de-

termined that there was no violation of due process. This involved approval of the entire process by which the confession was utilized including burden of proof which is an integral part of this process. In spelling out this process the Trial Judge indicated clearly and the Supreme Judicial Court stated flatly that the burden was on the defendant. See Petitioner's brief, page 23.

That burden of proof is an integral part of the process for determining voluntariness (indeed, as this case demonstrated, a singularly important aspect of such process) is emphasized by the state courts' view of their responsibility with respect to voluntariness. Because the defendant had this burden, they reasoned, their responsibility was limited to considering only matters expressly referred to by the Petitioner's trial counsel in challenging voluntariness. They postulated that they had no duty to consider other facts in the record not so referred to. Indeed, the Trial Judge carefully queried the Petitioner's trial counsel to be sure of the precise grounds of coercion relied upon (A. 189, 191) and in his Findings, Rulings and Order on the Petitioner's Motion for New Trial carefully specified that physical force was relied on at trial.

The Supreme Judicial Court recognized and affirmed the Trial Judge's limited exercise of responsibility in determining voluntariness. It stated that at trial the Trial Judge found "that there had been no physical coercion of the defendant" (A. 337). As for the factors which the Petitioner contended (citing *inter alia* *Miranda* v. *Arizona*, 384 U.S. 436, *Johnson* v. *New Jersey*, 384 U.S. 719 and *Davis* v. *North Carolina*, 384 U.S. 737) should have been considered by the Trial Judge, the Supreme Judicial Court held that:

"The factors which the defendant now points to could have been raised at the trial. It was incumbent upon the defendant to do so. The failure to raise them during the voir dire, coupled with the fact that the issue of voluntariness was not thereafter pursued at the trial, leads us to conclude that there was no error" (A. 340).[1]

The Petitioner devoted an entire section of its brief to the Supreme Judicial Court to the proposition that the Trial Judge failed to consider all factors as required by this Court. The Supreme Judicial Court rejected the argument that the Trial Judge had any such duty and its rejection was based on its holding on burden of proof.

Again, the very difference between the contentions of the Respondent and the Petitioner as to whether the issue of

[1] Both the Supreme Judicial Court (A. 340) and the Respondent in its brief to this Court (at pages 15-16) state that, although the Trial Judge had no duty to consider factors not expressly referred to by trial counsel, it did consider these factors. No basis is given for this conclusion except that the factors were in evidence and therefore presumably the Trial Judge considered them. But this conclusion is directly contradicted by the Trial Judge's statements in the record as to the issues presented to and decided by him (physical coercion, A. 97, 189, 191, 325 and *Escobedo*, A. 329-330). It is also directly contradicted by the following finding of the Trial Judge:

"I find that his willingness to talk to Lieutenant Donovan at this time was not a waiver of any 'right' he had to remain silent and to refuse to talk to the police at that time or to be cautioned by the police at that time of such 'rights', if it should be determined that in the circumstances he had any one or all of such 'rights'" (A. 329).

In the light of this position of the Trial Judge, one can hardly say that the Trial Judge considered the failure to honor these rights in determining voluntariness. It is clear, therefore, that largely because the burden of proof was placed upon the defendant, there never has been a finding of voluntariness in this case in the sense required by this Court.

voluntariness was determined below in accordance with the standards laid down by this Court illustrates that the burden of proof is an essential aspect of the process or procedure for making this determination. The Respondent contends, on page 17 of its brief, that the Trial Judge properly considered with respect to voluntariness only those matters to which "defense counsel . . . specifically direct[ed] the trial Court's attention." Respondent's brief, page 17.[2] This is directly contrary to the Petitioner's contentions, based on *Rogers* v. *Richmond,* 365 U.S. 534, and other decisions of this Court, that the Trial Judge has an affirmative duty to consider all factors bearing on voluntariness, whether or not expressly referred to by counsel. See Petitioner's brief, pages 18-22.

In overruling the Petitioner's objections and assignments of error the Supreme Judicial Court necessarily determined that imposing the burden on the defendant did not violate due process. It did so necessarily because the burden is an integral part of the process of determining voluntariness. Moreover, its rejection of the Petitioner's due process arguments that the *Miranda, Johnson* and *Davis* cases imposed an affirmative duty on the Trial Judge to consider all factors on voluntariness was based on its holding on burden of proof. In view of this Court's "ultimate responsibility" with respect to the "question whether there

[2] The Respondent's arguments on the Trial Judge's failure to instruct the jury are similar. While acknowledging (contrary to the Supreme Judicial Court's position), that there were before the jury some facts "contesting" voluntariness, the Respondent contends that the burden was on the Petitioner to establish a "framework that would have enabled the jury to appraise their bearing on the voluntariness of the statement." Respondent's brief, page 20. Again, contrary to this Court's holdings (see Petitioner's brief, page 25) the Respondent would require the defendant to shoulder the load on voluntariness.

has been a violation of the Due Process Clause of the Fourteenth Amendment by the introduction of an involuntary confession" (*Reck* v. *Pate*, 367 U.S. 433, 435), this Court has jurisdiction to consider the due process requirements with respect to burden of proof.

B.

The Due Process Issue of Burden of Proof Was Argued Below by Petitioner and Decided by the Massachusetts Supreme Judicial Court.

Not only was the due process issue of burden of proof, like all other aspects of due process relating to use of the Petitioner's confession, necessarily determined by the course of the proceedings below, but indeed, this issue was argued explicitly by the Petitioner before the Massachusetts Supreme Judicial Court.

In its brief[3] to that Court the Petitioner argued:

> "It is unclear under Massachusetts law whether the defendant has simply the burden of going forward on the issue of voluntariness (*Commonwealth* v. *McGarty, supra*) or the burden of proof as well. *Compare Commonwealth* v. *Sheppard*, 313 Mass. 590, 604 'The burden was on the defendant to show compulsion or promise of favor', *with Commonwealth* v. *Makarewicz*, 333 Mass. 575, 584 'The procedure generally followed in this Commonwealth when an alleged confession by the defendant is offered is to hold a voir dire examination

[3] This Court will look to the briefs of parties to determine whether it can be fairly said that the issue was raised below. See *Ker* v. *California*, 374 U.S. 23, 44 Footnote 15; *Beck* v. *Washington*, 369 U.S. 541, 575-576, Mr. Justice Black dissenting, Footnote 22. See also *Bryant* v. *Zimmerman*, 278 U.S. 63, 69.

in the absence of the jury on the issue of voluntariness and, if the judge finds that it was voluntary, to admit the confession and instruct the jury to disregard the confession entirely *unless they find that it was made voluntarily.*' (Emphasis supplied.) As Justice Black pointed out in his opinion concurring in part and dissenting in part in *Jackson* v. *Denno, supra* at 404-405, the Supreme Court left open the question of which party has the burden of proof on the issue of voluntariness apparently because the New York rule there involved placed the burden on the State. Justice Black left little doubt that he believed this to be a constitutional question for he stated with respect to burden of proof that 'In fashioning its new constitutional rule, the Court should not leave this important question in doubt.' See *Annotation,* 1 ALR 3rd, 1250, 1259. The Supreme Court in *Miranda* v. *Arizona, supra,* has made it quite clear that the burden of proving compliance with the rules there set forth is on the prosecution which is a strong indication as to how the Court would impose the burden of proof on the issue of voluntariness."

In answer to this argument the Respondent argued in its brief to that Court that the "statement of defendant Johnson was prima facie voluntary when offered" citing *Commonwealth* v. *Beaulieu,* 333 Mass. 640, 655 and *Commonwealth* v. *McGarty,* 323 Mass. 435, 438. In its opinion the Massachusetts Supreme Judicial Court held squarely that the burden of proof on this issue was on the defendant.[4]

[4] There was no suggestion by the Supreme Judicial Court that it would not consider this issue on the grounds that it was not raised by exception or assignment of error. In fact, of course, the Petitioner did except amply to admission of his confession and the Peti-

This was not a "comment" as the Respondent suggests but was plainly a holding of the Court in response to the arguments of the Petitioner and the Respondent. The Supreme Judicial Court in support of its holding cited the two Massachusetts cases also cited for its argument on this point by the Respondent.

The rule in *Beck* v. *Washington, supra,* and other cases cited by the Respondent, does not apply to this case. The Petitioner's argument on burden of proof, including his contentions as to constitutionality, were rejected by the Supreme Judicial Court.[5] "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley* v. *Ohio,* 360 U.S. 423, 436.

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tioner's Assignment of Error No. 13 to the Supreme Judicial Court specified that "the trial court erred in failing to instruct the jury that they should disregard Johnson's statement to Detective Lt. Donovan *unless they found it was made voluntarily.*" (Emphasis supplied.) (See also Assignment of Error Nos. 7 and 12, A. 332-333.) Indeed, it is plain from this as well as other Massachusetts cases that in a capital case the Supreme Judicial Court "in light of the broad power conferred on us under G.L. c. 278, §33E" (*Commonwealth* v. *Johnson,* —— Mass. —— (A. 338).) considers all alleged errors. "That section 'consigns the facts as well as the law to our consideration, gives us the power and the duty exercised by a trial judge upon a motion for a new trial, and requires us to consider the whole case broadly to determine whether there was any miscarriage of justice.'" *Commonwealth* v. *Kerrigan,* 345 Mass. 508, 510.

[5] "While thus casting its judgment in terms of state law, the court's affirmation of Turner's conviction necessarily rejected his claim that the conduct of the trial had violated the Fourteenth Amendment. We hold otherwise with respect to the federal constitutional issue, and accordingly reverse the judgment before us." *Turner* v. *Louisiana, supra* at 470-471. See also *Grand River Dam Authority* v. *Grand-Hydro,* 335 U.S. 359, 369-370.

C.

Imposition of the Burden of Proof on State Prosecutions Was Not One of the Miranda Guidelines to Which Johnson v. New Jersey Gave Prospective Effect Only.

The brief for the Respondent recognizes the force of the opinion in *Miranda* on the issue of burden of proof on voluntariness (Footnote 14, p. 21). However, it attempts to avoid the consequences of this recognition by incorporating into the "guidelines" of *Miranda* the foreshadowing on the burden of proof issue contained in *Miranda*. The Respondent attempts thus to apply to the burden of proof question the retroactivity rules of *Johnson* v. *New Jersey*, 384 U.S. 719.

Contrary to the Respondent's statement in Footnote 14 of its brief, however, determination of this issue was plainly not part of the *Miranda* "guidelines" to which *Johnson* gave prospective effect only. The *Johnson* case gave prospective effect to the "new standards governing in-custody interrogation" laid down in *Miranda*. "[T]hese guidelines are therefore available only to persons whose trials had not begun as of June 13, 1966" (at 734). There is not the slightest suggestion either in the language or logic of *Johnson* that imposing on state prosecutions the burden of proof on the issue of voluntariness is one of the "guidelines" to which this statement has reference.[6] Indeed, the *Johnson* case states flatly that "our case law on coerced confessions is available for persons whose trials have already been completed . . ."; this includes even the "new standards gov-

[6] *Malloy* v. *Hogan*, 378 U.S. 1 might be said to be as equally relevant to the burden of proof as *Miranda*. See Petitioner's brief, page 23. Of course, neither case constitutes a holding on this issue.

erning in-custody interrogation" of which past defendants might still avail themselves on the voluntariness test (at 730). To the extent, therefore, that the *Johnson* case addresses itself to the retroactivity of constitutional rules governing determination of voluntariness, it holds (in contrast to its holding on the *Miranda* guidelines) that such rules shall have completely retroactive effect.

Respectfully submitted,

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